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Residence and Scope of Total Income

UNIT – 1 : RESIDENTIAL STATUS AND SCOPE OF TOTAL INCOME

Learning objectives

After studying this unit, you would be able to understand -

- ◆ the relevance and significance of residential status in determining total income of a person
- ◆ the types of residential status
- ◆ the rules for determining residential status for different categories of persons
- ◆ the scope of income includible in total income for each residential status

1.1 Residential Status [Section 6]

The incidence of tax on any assessee depends upon his residential status under the Act. Therefore, after determining whether a particular amount is capital or revenue in nature, if the receipt is of a revenue nature and chargeable to tax, it has to be seen whether the assessee is liable to tax in respect of that income. The taxability of a particular receipt would thus depend upon not only the nature of the income and the place of its accrual or receipt but also upon the assessee's residential status.

For all purposes of income-tax, taxpayers are classified into three broad categories on the basis of their residential status. viz

- (1) Resident and ordinarily resident
- (2) Resident but not ordinarily resident
- (3) Non-resident

The residential status of an assessee must be ascertained with reference to each previous year. A person who is resident and ordinarily resident in one year may become non-resident or resident but not ordinarily resident in another year or *vice versa*. The provisions for determining the residential status of assessee are:

(1) Residential status of Individuals: Under section 6(1), an individual is said to be resident in India in any previous year, if he satisfies **any one** of the following conditions:

- (i) He has been in India during the previous year for a total period of 182 days or more, or
- (ii) He has been in India during the 4 years immediately preceding the previous year for a total period of 365 days or more and has been in India for at least 60 days in the previous year.

If the individual satisfies any one of the conditions mentioned above, he is a resident. If both the above conditions are not satisfied, the individual is a non-resident.

Note:

- (a) The term "stay in India" includes stay in the territorial waters of India (i.e. 12 nautical miles into the sea from the Indian coastline). Even the stay in a ship or boat moored in the territorial waters of India would be sufficient to make the individual resident in India.
- (b) It is not necessary that the period of stay must be continuous or active nor is it essential that the stay should be at the usual place of residence, business or employment of the individual.
- (c) For the purpose of counting the number of days stayed in India, both the date of departure as well as the date of arrival are considered to be in India.
- (d) The residence of an individual for income-tax purpose has nothing to do with citizenship, place of birth or domicile. An individual can, therefore, be resident in more countries than one even though he can have only one domicile.

Exceptions:

The following categories of individuals will be treated as residents only if the period of their stay during the relevant previous year amounts to 182 days. In other words even if such persons were in India for 365 days during the 4 preceding years and 60 days in the relevant previous year, they will not be treated as resident.

- (1) Indian citizens, who leave India in any previous year as a member of the crew of an Indian ship or for purposes of employment outside India, or
- (2) Indian citizen or person of Indian origin* engaged outside India in an employment or a business or profession or in any other vocation, who comes on a visit to India in any previous year

* A person is said to be of Indian origin if he or either of his parents or either of his grandparents were born in undivided India.

Not-ordinarily resident - Only individuals and HUF can be resident but not ordinarily resident in India. All other classes of assesseees can be either a resident or non-resident. A not-ordinarily resident person is one who satisfies any one of the conditions specified under section 6(6).

- (i) If such individual has been non-resident in India in any 9 out of the 10 previous years preceding the relevant previous year, or

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- (ii) If such individual has during the 7 previous years preceding the relevant previous year been in India for a period of 729 days or less.

Note: In simpler terms, an individual is said to be a resident and ordinarily resident if he satisfies both the following conditions:

- (i) He is a resident in any 2 out of the last 10 years preceding the relevant previous year, and
- (ii) His total stay in India in the last 7 years preceding the relevant previous year is 730 days or more.

If the individual satisfies both the conditions mentioned above, he is a resident and ordinarily resident but if only one or none of the conditions are satisfied, the individual is a resident but not ordinarily resident.

Illustration 1

Steve Waugh, the Australian cricketer comes to India for 100 days every year. Find out his residential status for the A.Y. 2015-16.

Solution

For the purpose of his residential status in India for A.Y. 2015-16, the relevant previous year is 2014-15.

Step 1: The total stay of Steve Waugh in the last 4 years preceding the previous year is 400 days (i.e., 100×4) and his stay in the previous year is 100 days. Therefore, since he has satisfied the second condition in section 6(1), he is a resident.

Step 2: Since his total stay in India in the last 7 years preceding the previous year is 700 days (i.e., 100×7), he does not satisfy the minimum requirement of 730 days in 7 years. Any one of the conditions not being satisfied, the individual is resident but not ordinarily resident.

Therefore, the residential status of Steve Waugh for the assessment year 2015-16 is resident but not ordinarily resident.

Illustration 2

Mr. B, a Canadian citizen, comes to India for the first time during the P.Y. 2010-11. During the financial years 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15, he was in India for 55 days, 60 days, 90 days, 150 days and 70 days, respectively. Determine his residential status for the A.Y. 2015-16.

Solution

During the previous year 2014-15, Mr. B was in India for 70 days and during the 4 years preceding the previous year 2014-15, he was in India for 355 days (i.e. $55 + 60 + 90 + 150$ days).

Thus, he does not satisfy section 6(1). Therefore, he is a non-resident for the previous year 2014-15.

Illustration 3

Mr. C, a Japanese citizen left India after a stay of 10 years on 1.06.2012. During the financial year 2013-14, he comes to India for 46 days. Later, he returns to India for 1 year on 10.10.2014. Determine his residential status for the A.Y. 2015-16.

Solution

During the previous year 2014-15, Mr. C was in India for 173 days (i.e. 22 + 30 + 31 + 31 + 28 + 31 days). His stay in the last 4 years is:

2013-14	-	46	
2012-13	-	62	(i.e. 30 + 31 + 1)
2011-12	-	365	(since he left India on 1.6.2012 after 10 years)
2010-11	-	<u>365</u>	(since he left India on 1.6.2012 after 10 years)
		<u>838</u>	

Mr. C is a resident since his stay in the previous year 2014-15 is 173 days and in the last 4 years is more than 365 days.

For the purpose of being ordinarily resident, it is evident from the above calculations, that

- (i) his stay in the last 7 years is more than 730 days and
- (ii) since he was in India for 10 years prior to 1.6.2012, he was a resident in at least 2 out of the last 10 years preceding the relevant previous year.

Therefore, Mr.C is a resident and ordinarily resident for the A.Y.2015-16.

Illustration 4

Mr. D, an Indian citizen, leaves India on 22.9.2014 for the first time, to work as an officer of a company in France. Determine his residential status for the A.Y. 2015-16.

Solution

During the previous year 2014-15, Mr. D, an Indian citizen, was in India for 175 days (i.e. 30+ 31+30+31+31+22 days). He does not satisfy the minimum criteria of 182 days. Also, since he is an Indian citizen leaving India for the purposes of employment, the second condition under section 6(1) is not applicable to him.

Therefore, Mr. D is a non-resident for the A.Y.2015-16.

(2) Residential status of HUF: A HUF would be resident in India if the control and management of its affairs is situated wholly or partly in India. If the control and management of the affairs is situated wholly outside India it would become a non-resident.

The expression 'control and management' referred to under section 6 refers to the central control and management and not to the carrying on of day-to-day business by servants, employees or agents. The business may be done from outside India and yet its control and

management may be wholly within India. Therefore, control and management of a business is said to be situated at a place where the head and brain of the adventure is situated. The place of control may be different from the usual place of running the business and sometimes even the registered office of the assessee. This is because the control and management of a business need not necessarily be done from the place of business or from the registered office of the assessee. But control and management do imply the functioning of the controlling and directing power at a particular place with some degree of permanence.

If the HUF is resident, then the status of the Karta determines whether it is resident and ordinarily resident or resident but not ordinarily resident. If the karta is resident and ordinarily resident, then the HUF is resident and ordinarily resident and if the karta is resident but not ordinarily resident, then HUF is resident but not ordinarily resident.

Illustration 5

The business of a HUF is transacted from Australia and all the policy decisions are taken there. Mr. E, the karta of the HUF, who was born in Kolkata, visits India during the P.Y.2014-15 after 15 years. He comes to India on 1.4.2014 and leaves for Australia on 1.12.2014. Determine the residential status of Mr.E and the HUF for A.Y. 2015-16.

Solution

- (a) During the P.Y.2014-15, Mr. E has stayed in India for 245 days (i.e. 30+31+30+31+31+30+31+30+1 days). Therefore, he is a resident. However, since he has come to India after 15 years, he cannot satisfy any of the conditions for being ordinarily resident.

Therefore, the residential status of Mr. E for the P.Y.2014-15 is resident but not ordinarily resident.

- (b) Since the business of the HUF is transacted from Australia and nothing is mentioned regarding its control and management, it is assumed that the control and management is also wholly outside India. Therefore, the HUF is a non-resident for the P.Y.2014-15.

(3) Residential status of firms and association of persons: A firm and an AOP would be resident in India if the control and management of its affairs is situated wholly or partly in India. Where the control and management of the affairs is situated wholly outside India, the firm would become a non-resident.

(4) Residential status of companies: A company is said to be resident in India if -

- (i) it is an Indian company as defined under section 2(26), or
- (ii) its control and management is situated wholly in India during the accounting year.

Thus, every Indian company is resident in India irrespective of the fact whether the control and management of its affairs is exercised from India or outside. But a company, other than an Indian company, would become resident in India only if the entire control and management of its affairs is in India.

The control and management of the affairs of company are said to be exercised from the place where the director's meetings (not shareholders' meetings) are held, decisions taken and directions issued.

(5) Residential status of local authorities and artificial juridical persons: Local authorities and artificial juridical persons would be resident in India if the control and management of its affairs is situated wholly or partly in India. Where the control and management of the affairs is situated wholly outside India, they would become non-residents.

Note: In simpler terms, individual is said to be a resident and ordinarily resident if he satisfies both the following conditions:

- (i) He is a resident in any 2 out of the last 10 years preceding the relevant previous year, and
- (iii) His total stay in India in the last 7 years preceding the relevant previous year is 730 days or more.

If the individual satisfies both the conditions mentioned above, he is a resident and ordinarily resident but if only one or none of the conditions are satisfied, the individual is a resident but not ordinarily resident.

1.2 Scope of Total Income

Section 5 provides the scope of total income in terms of the residential status of the assessee because the incidence of tax on any person depends upon his residential status. The scope of total income of an assessee depends upon the following three important considerations:

- (i) the residential status of the assessee (as discussed earlier);
- (ii) the place of accrual or receipt of income, whether actual or deemed; and
- (iii) the point of time at which the income had accrued to or was received by or on behalf of the assessee.

The ambit of total income of the three classes of assessee would be as follows:

(1) Resident and ordinarily resident - The total income of a resident assessee would, under section 5(1), consist of:

- (i) income received or deemed to be received in India during the previous year;
- (ii) income which accrues or arises or is deemed to accrue or arise in India during the previous year; and
- (iii) income which accrues or arises outside India even if it is not received or brought into India during the previous year.

In simpler terms, a resident and ordinarily resident has to pay tax on the total income accrued or deemed to accrue, received or deemed to be received in or outside India.

(2) Resident but not ordinarily resident – Under section 5(1), the computation of total income of resident but not ordinarily resident is the same as in the case of resident and

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ordinarily resident stated above except for the fact that the income accruing or arising to him outside India is not to be included in his total income. However, where such income is derived from a business controlled from or profession set up in India, then it must be included in his total income even though it accrues or arises outside India.

(3) Non-resident - A non-resident's total income under section 5(2) includes:

- (i) income received or deemed to be received in India in the previous year; and
- (ii) income which accrues or arises or is deemed to accrue or arise in India during the previous year.

Note: All assesseees, whether resident or not, are chargeable to tax in respect of their income accrued, arisen, received or deemed to accrue, arise or to be received in India whereas residents alone are chargeable to tax in respect of income which accrues or arises outside India.

Resident And Ordinarily Resident	Resident But Not Ordinarily Resident	Non-Resident
Income received/ deemed to be received/ accrued or arisen/deemed to accrue or arise in or outside India.	Income which is received/deemed to be received/accrued or arisen/deemed to accrue or arise in India. and Income which accrues or arises outside India being derived from a business controlled from or profession set up in India.	Income received/ deemed to be received/ accrued or arisen/deemed to accrue or arise in India.

UNIT –2 : DEEMED RECEIPT AND ACCRUAL OF INCOME IN INDIA**Learning objectives**

After studying this unit, you would be able to understand -

- ◆ which are the income deemed to be received in India
- ◆ the meaning of income accruing or arising in India
- ◆ which are the income deemed to accrue or arise in India.

The taxability of a certain item as income would depend upon the method of accounting followed by the assessee. This is because under the cash system of accounting an income would be taxable only when it is received by the assessee himself or on his behalf. But under the mercantile system it would be taxable once the assessee gets the legal right to claim the amount. However, it has been specifically provided that in the case of income from salaries, the liability to tax arises immediately when the income is due to the assessee irrespective of the method of accounting followed. Likewise, in the case of dividends, the income would be included in total income of the shareholder under section 8 in the year in which the final dividend is declared and, in the case of interim dividend, in the year in which they are made unconditionally available to the shareholders.

2.1 Meaning of “Income received or deemed to be received”

All assesseees are liable to tax in respect of the income received or deemed to be received by them in India during the previous year irrespective of -

- (i) their residential status, and
- (ii) the place of its accrual.

Income is to be included in the total income of the assessee immediately on its actual or deemed receipt. The receipt of income refers to only the first occasion when the recipient gets the money under his control. Therefore, when once an amount is received as income, remittance or transmission of that amount from one place or person to another does not constitute receipt of income in the hands of the subsequent recipient or at the place of subsequent receipt.

Income deemed to be received – Under section 7, the following shall be deemed to be received by the assessee during the previous year irrespective of whether he had actually received the same or not -

- (i) The annual accretion in the previous year to the balance to the credit of an employee participating in a recognised provident fund (RPF). Thus, the contribution of the employer in excess of 12% of salary or interest credited in excess of 9.5% p.a. is deemed to be received by the assessee.

- (ii) The taxable transferred balance from unrecognized to recognized provident fund (being the employer's contribution and interest thereon).
- (iii) The contribution made by the Central Government or any other employer in the previous year to the account of an employee under a pension scheme referred to under section 80CCD.

2.2 Meaning of income 'accruing' and 'arising'

Accrue refers to the right to receive income, whereas due refers to the right to enforce payment of the same. For e.g. salary for work done in December will accrue throughout the month, day to day, but will become due on the salary bill being passed on 31st December or 1st January. Similarly, on Government securities, interest payable on specified dates arise during the period of holding, day to day, but will become due for payment on the specified dates. Example: Interest on Government securities is usually payable on specified dates, say on 1st January and 1st July. In all such cases, the interest would be said to accrue from 1st July to 31st December and on 1st January, it will fall due for payment.

It must be noted that income which has been taxed on accrual basis cannot be assessed again on receipt basis, as it will amount to double taxation. For example, when a loan to a director has already been treated as dividend under section 2(22)(e) and later dividend is declared, distributed and adjusted against the loan, the same cannot be treated as dividend income again.

With a view to removing difficulties and clarifying doubts in the taxation of income, *Explanation 1* to Section 5 specifically provides that an item of income accruing or arising outside India shall not be deemed to be received in India merely because it is taken into account in a balance sheet prepared in India.

Further, *Explanation 2* to Section 5 makes it clear that once an item of income is included in the assessee's total income and subjected to tax on the ground of its accrual/deemed accrual or receipt, it cannot again be included in the person's total income and subjected to tax either in the same or in a subsequent year on the ground of its receipt - whether actual or deemed.

2.3 Income deemed to accrue or arise in India [Section 9]

Certain types of income are deemed to accrue or arise in India even though they may actually accrue or arise outside India. The categories of income which are deemed to accrue or arise in India are:

- (i) Any income accruing or arising to an assessee in any place outside India whether directly or indirectly (a) through or from any business connection in India, (b) through or from any property in India, (c) through or from any asset or source of income in India or (d) through the transfer of a capital asset situated in India.

The legislative intent of this clause is to cover incomes, which are accruing or arising, directly or indirectly from a source in India. The section codifies the source rule of taxation, which signifies that where a corporate structure is created to route funds, the

actual gain or income arises only in consequence of the investment made in the activity to which such gains are attributable and not the mode through which such gains are realized. This principle which supports the source country's right to tax the gains derived from offshore transactions where the value is attributable to the underlying assets, is recognized internationally by several countries.

Accordingly, *Explanation 4* clarifies that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".

Further, *Explanation 5* clarifies that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

- (ii) Income, which falls under the head "Salaries", if it is earned in India. Any income under the head "Salaries" payable for rest period or leave period which is preceded and succeeded by services rendered in India, and forms part of the service contract of employment, shall be regarded as income earned in India.
- (iii) Income from 'Salaries' which is payable by the Government to a citizen of India for services rendered outside India (However, allowances and perquisites paid outside India by the Government is exempt).
- (iv) Dividend paid by a Indian company outside India.
- (v) Interest (discussed in para 5 below)
- (vi) Royalty (discussed in para 6 below)
- (vii) Fees for technical services (discussed in para 7 below)
- (1) (a) **Income from business connection:** The expression "business connection" has been explained in *Explanation 2* to section 9(1)(i).
 - (i) 'Business connection' shall include any business activity carried out through a person acting on behalf of the non-resident.
 - (ii) He must have an authority which is habitually exercised to conclude contracts on behalf of the non-resident. However, if his activities are limited to the purchase of goods or merchandise for the non-resident, this provision will not apply.
 - (iii) Where he has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident, a business connection is established.
 - (iv) Business connection is also established where he habitually secures orders in India, mainly or wholly for the non-resident. Further, there may be situations when other non-residents control the above-mentioned non-resident. Secondly, this non-resident may

also control other non-residents. Thirdly, all other non-residents may be subject to the same common control, as that of the non-resident. In all the three situations, business connection is established, where a person habitually secures orders in India, mainly or wholly for such non-residents.

Exception:

"Business connection", however, shall not be held to be established in cases where the non-resident carries on business through a broker, general commission agent or any other agent of an independent status, if such a person is acting in the ordinary course of his business.

A broker, general commission agent or any other agent shall be deemed to have an independent status where he does not work mainly or wholly for the non-resident. He will however, not be considered to have an independent status in the three situations explained in (iv) above, where he is employed by such a non-resident.

Where a business is carried on in India through a person referred to in (ii), (iii) or (iv) mentioned above, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

(1) (b) &(c) Income from property, asset or source of income

Any income which arises from any property (movable, immovable, tangible and intangible property) would be deemed to accrue or arise in India eg. hire charges or rent paid outside India for the use of the machinery or buildings situated in India, deposits with an Indian company for which interest is received outside India etc.

(1)(d) Income through the transfer of a capital asset situated in India

Capital gains arising from the transfer of a capital asset situated in India would be deemed to accrue or arise in India in all cases irrespective of the fact whether (i) the capital asset is movable or immovable, tangible or intangible; (ii) the place of registration of the document of transfer etc., is in India or outside; and (iii) the place of payment of the consideration for the transfer is within India or outside.

Explanation 1 to section 9(1)(i) lists out income which shall not be deemed to accrue or arise in India. They are given below:

1. **In the case of a business, in respect of which all the operations are not carried out in India [Explanation 1(a) to section 9(1)(i)]** :In the case of a business of which all the operations are not carried out in India, the income of the business deemed to accrue or arise in India shall be only such part of income as is reasonably attributable to the operations carried out in India. Therefore, it follows that such part of income which cannot be reasonably attributed to the operations in India, is not deemed to accrue or arise in India.
2. **Purchase of goods in India for export [Explanation 1(b) to section 9(1)(i)]**: In the case of a non-resident, no income shall be deemed to accrue or arise in India to him

through or from operations which are confined to the purchase of goods in India for the purpose of export.

3. **Collection of news and views in India for transmission out of India [Explanation 1(c) to section 9(1)(i)]:** In the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India.
4. **Shooting of cinematograph films in India [Explanation 1(d) to section 9(1)(i)]:** In the case of a non-resident, no income shall be deemed to accrue or arise in India through or from operations which are confined to the shooting of any cinematograph film in India, if such non-resident is :
 - (i) an individual, who is not a citizen of India or
 - (ii) a firm which does not have any partner who is a citizen of India or who is resident in India ; or
 - (iii) a company which does not have any shareholder who is a citizen of India or who is resident in India.

(2) & (3) Income from salaries: Under section 9(1)(ii) income which falls under the head 'salaries', would be deemed to accrue or arise in India, if it is in respect of services rendered in India.

Exception under section 9(2): Pension payable outside India by the Government to its officials and judges who permanently reside outside India shall not be deemed to accrue or arise in India. It may however, be noted here that the salary of an employee in the United Nations Organisation (UNO) or in its constituent bodies is exempt under United Nations (Privilege and Immunity) Act.

(4) Income from dividends: All dividends paid by an Indian company must be deemed to accrue or arise in India. Under section 10(34), income from dividends referred to in section 115-O are exempt from tax in the hands of the shareholder. It may be noted that dividend distribution tax under section 115-O does not apply to deemed dividend under section 2(22)(e), which is chargeable in the previous year in which such dividend is distributed or paid.

(5) Interest: Under section 9(1)(v), an interest is deemed to accrue or arise in India if it is payable by -

- (i) the Central Government or any State Government.
- (ii) a person resident in India (except where it is payable in respect of any money borrowed and used for the purposes of a business or profession carried on by him outside India or for the purposes of making or earning any income from any source outside India)

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- (iii) a non-resident when it is payable in respect of any debt incurred or moneys borrowed and used for the purpose of a business or profession carried on in India by him. Interest on money borrowed by the non-resident for any purpose other than a business or profession, will not be deemed to accrue or arise in India. Thus, if a non-resident 'A' borrows money from a non-resident 'B' and invests the same in shares of an Indian company, interest payable by 'A' to 'B' will not be deemed to accrue or arise in India.

(6) Royalty: Royalty will be deemed to accrue or arise in India when it is payable by -

- (i) the Government; or
- (ii) a person who is a resident in India except in cases where it is payable for the transfer of any right or the use of any property or information or for the utilization of services for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
- (iii) a non-resident only when the royalty is payable in respect of any right, property or information used or services utilised for purposes of a business or profession carried on in India or for the purposes of making or earning any income from any source in India.

Lumpsum royalty payments made by a resident for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with computer hardware under any scheme approved by the Government under the Policy on Computer Software Export, Software Development and Training, 1986 shall not be deemed to accrue or arise in India.

"Computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customised electronic data.

The term 'royalty' means consideration (including any lumpsum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital gains') for:

- (i) the transfer of all or any rights (including the granting of licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- (v) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
- (vi) the transfer of all or any rights (including the granting of licence) in respect of any

copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films;

(vii) the rendering of any service in connection with the activities listed above.

The definition of 'royalty' for this purpose is wide enough to cover both industrial royalties as well as copyright royalties. The deduction specially excludes income which should be chargeable to tax under the head 'capital gains'.

Consideration for use or right to use of computer software is royalty within the meaning of section 9(1)(vi)

As per section 9(1)(vi), any income payable by way of royalty in respect of any right, property or information is deemed to accrue or arise in India. The term "royalty" means consideration for transfer of all or any right in respect of certain rights, property or information. There have been conflicting court rulings on the interpretation of the definition of royalty, on account of which there was a need to resolve the following issues –

- (i) Does consideration for use of computer software constitute royalty?
- (ii) Is it necessary that the right, property or information has to be used directly by the payer?
- (iii) Is it necessary that the right, property or information has to be located in India or control or possession of it has to be with the payer?
- (iv) What is the meaning of the term "process"?

In order to resolve the above issues arising on account of conflicting judicial decisions and to clarify the true legislative intent, Explanations 4, 5 & 6 have been inserted with retrospective effect from 1st June, 1976.

Explanation 4 clarifies that the consideration for use or right to use of computer software is royalty by clarifying that, transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Consequently, the provisions of tax deduction at source under section 194J and section 195 would be attracted in respect of consideration for use or right to use computer software since the same falls within the definition of royalty.

Note - The Central Government has, vide *Notification No.21/2012 dated 13.6.2012* to be effective from 1st July, 2012, exempted certain software payments from the applicability of tax deduction under section 194J. Accordingly, where payment is made by the transferee for acquisition of software from a resident-transferor, the provisions of section 194J would not be attracted if -

- (1) the software is acquired in a subsequent transfer without any modification by the transferor;
- (2) tax has been deducted either under section 194J or under section 195 on payment for any previous transfer of such software; and
- (3) the transferee obtains a declaration from the transferor that tax has been so deducted along with the PAN of the transferor.

Explanation 5 clarifies that royalty includes and has always included consideration in respect of any right, property or information, whether or not,

- (a) the possession or control of such right, property or information is with the payer;
- (b) such right, property or information is used directly by the payer;
- (c) the location of such right, property or information is in India.

Explanation 6 clarifies that the term "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.

(7) Fees for technical services: Any fees for technical services will be deemed to accrue or arise in India if they are payable by -

- (i) the Government.
- (ii) a person who is resident in India, except in cases where the fees are payable in respect of technical services utilised in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India.
- (iii) a person who is a non-resident, only where the fees are payable in respect of services utilised in a business or profession carried on by the non-resident in India or where such services are utilised for the purpose of making or earning any income from any source in India.

Fees for technical services means any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including providing the services of technical or other personnel). However, it does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'.

Income deemed to accrue or arise in India to a non-resident by way of interest, royalty and fee for technical services to be taxed irrespective of territorial nexus (*Explanation to section 9*)

Income by way of interest, royalty or fee for technical services which is deemed to accrue or arise in India by virtue of clauses (v), (vi) and (vii) of section 9(1), shall be included in the total income of the non-resident, whether or not –

- (i) the non-resident has a residence or place of business or business connection in India; or
- (ii) the non-resident has rendered services in India.

In effect, the income by way of fee for technical services, interest or royalty, from services utilized in India would be deemed to accrue or arise in India in case of a non-resident and be included in his total income, whether or not such services were rendered in India.

Illustration 6

Compute the total income in the hands of an individual, being a resident and ordinarily resident, resident but not ordinarily resident, and non-resident for the A.Y. 2015-16 -

<i>Particulars</i>	<i>Amount (₹)</i>
<i>Interest on UK Development Bonds, 50% of interest received in India</i>	<i>10,000</i>
<i>Income from a business in Chennai (50% is received in India)</i>	<i>20,000</i>
<i>Profits on sale of shares of an Indian company received in London</i>	<i>20,000</i>
<i>Dividend from British company received in London</i>	<i>5,000</i>
<i>Profits on sale of plant at Germany 50% of profits are received in India</i>	<i>40,000</i>
<i>Income earned from business in Germany which is controlled from Delhi (₹ 40,000 is received in India)</i>	<i>70,000</i>
<i>Profits from a business in Delhi but managed entirely from London</i>	<i>15,000</i>
<i>Income from house property in London deposited in a Indian Bank at London, brought to India (Computed)</i>	<i>50,000</i>
<i>Interest on debentures in an Indian company received in London.</i>	<i>12,000</i>
<i>Fees for technical services rendered in India but received in London</i>	<i>8,000</i>
<i>Profits from a business in Bombay managed from London</i>	<i>26,000</i>
<i>Pension for services rendered in India but received in Burma</i>	<i>4,000</i>
<i>Income from property situated in Pakistan received there</i>	<i>16,000</i>
<i>Past foreign untaxed income brought to India during the previous year</i>	<i>5,000</i>
<i>Income from agricultural land in Nepal received there and then brought to India</i>	<i>18,000</i>
<i>Income from profession in Kenya which was set up in India, received there but spent in India</i>	<i>5,000</i>
<i>Gift received on the occasion of his wedding</i>	<i>20,000</i>
<i>Interest on savings bank deposit in State Bank of India</i>	<i>12,000</i>
<i>Income from a business in Russia, controlled from Russia</i>	<i>20,000</i>
<i>Dividend from Reliance Petroleum Limited, an Indian Company</i>	<i>5,000</i>
<i>Agricultural income from a land in Rajasthan</i>	<i>15,000</i>

Solution:**Computation of total income for the A.Y. 2015-16**

Particulars	Resident and ordinarily resident ₹	Resident but not ordinarily resident ₹	Non-resident ₹
Interest on UK Development Bonds, 50% of interest received in India	10,000	5,000	5,000
Income from a business in Chennai (50% is received in India)	20,000	20,000	20,000
Profits on sale of shares of an Indian company received in London (assuming that they are in the nature of short-term capital gains)	20,000	20,000	20,000
Dividend from British company received in London	5,000	-	-
Profits on sale of plant at Germany, 50% of profits are received in India	40,000	20,000	20,000
Income earned from business in Germany which is controlled from Delhi, out of which ₹ 40,000 is received in India	70,000	70,000	40,000
Profits from a business in Delhi but managed entirely from London	15,000	15,000	15,000
Income from property in London deposited in a Bank at London, later on remitted to India	50,000	-	-
Interest on debentures in an Indian company received in London.	12,000	12,000	12,000
Fees for technical services rendered in India but received in London	8,000	8,000	8,000
Profits from a business in Bombay managed from London	26,000	26,000	26,000
Pension for services rendered in India but received in Burma	4,000	4,000	4,000
Income from property situated in Pakistan received there	16,000	-	-
Past foreign untaxed income brought to India during the previous year	-	-	-
Income from agricultural land in Nepal received there and then brought to India	18,000	-	-
Income from profession in Kenya which was set up in India, received there but spent in India	5,000	5,000	-

Gift received on the occasion of his wedding [not taxable]	-	-	-
Interest on savings bank deposit in State Bank of India	12,000	12,000	12,000
Income from a business in Russia, controlled from Russia	20,000	-	-
Dividend from Reliance Petroleum Limited, an Indian Company [Exempt under section 10(34)]	-	-	-
Agricultural income from a land in Rajasthan [Exempt under section 10(1)]	-	-	-
Gross Total Income	3,51,000	2,17,000	1,82,000
<i>Less:</i> Deduction under section 80TTA			
[Interest on savings bank account subject to a maximum of ₹ 10,000]	10,000	10,000	10,000
Total Income	3,41,000	2,07,000	1,72,000